



**The World Political Forum
Regional Seminar
(London, 20 May 2004)**

**Justified war, Iraq and the reform of
the United Nations**

INDEX

Justified war, Iraq and the reform of the United Nations

| | |
|---|----|
| Professor Lord Robert Skidelsky , <i>Chairman of the Centre for Global Studies, Professor of Political Economy at the University of Warwick – THE RETURN OF WAR, THE JUST WAR TRADITION AND THE REFORM OF THE UNITED NATIONS</i> | 3 |
| Professor Nigel Biggar , <i>Professor of Theology and Ethics, Trinity College Dublin – A CASE FOR THE MORALITY OF THE IRAQ WAR</i> | 11 |
| Matthew Hassan Kukah , <i>Catholic Reverend Father; Visiting Fellow, Harvard University; former Secretary General of the Catholic Secretariat in Nigeria – A CASE AGAINST THE MORALITY OF THE IRAQ WAR</i> | 15 |
| Professor Timothy Garden , <i>former Air Marshal and former Director of the Royal Institute of International Affairs – APPLICATION OF THE JUST WAR THEORY TO THE IRAQ WAR</i> | 16 |
| Professor Edoardo Greppi , <i>Professor of International Law and European Union law, Turin University – TERRORISM AND ROGUE STATES: REFLECTIONS ON INTERNATIONAL LAW ISSUES</i> | 17 |
| Lord David Owen , <i>former Minister of Foreign Affairs of UK – TERRORISM AND ROGUE STATES</i> | 24 |
| Professor Mary Kaldor , <i>Professor in Global Governance at the London School of Economics – JUST WAR AND HUMANITARIAN INTERVENTION</i> | 32 |
| SUMMARY | 35 |

THE RETURN OF WAR, THE JUST WAR TRADITION AND THE REFORM OF THE UNITED NATIONS

RETURN OF WAR

In recent years there has been a revival of war as a “policy of choice”. Since the collapse of communism, America and its allies have invaded Iraq (twice), Yugoslavia, and Afghanistan. Currently the “international community” is engaged in a “war against terrorism.” With ‘hot war’ released from its cold war constraints it is important to consider under what conditions resort to war is justifiable, and what methods of fighting wars are right. This is the domain of “just war” theory. There is the related question of how just war doctrine may be fruitfully applied by the UN, the main custodian of international law.

The return of war as a policy of choice overturns the rejection of war which dominated the post-second world war period. This was enshrined in the UN Charter which allowed only wars of self-defence and proscribed intervention in the domestic affairs of sovereign states. This position—a reaction to the two world wars of the 20th century—was reinforced by the unique destructiveness of nuclear weapons. The threat of MAD (mutually assured destruction) prevented war between the two cold war superpowers, and made possible the semi-pacifism of Europe and Japan, sheltering under the nuclear umbrella. Not just the morality of war, but its utility, was increasingly questioned. The conventional view was that superior firepower could not prevail against ideologically inspired guerrillas. After Vietnam, the US became increasingly reluctant to accept casualties.

None of this meant that warfare disappeared from the planet. “Hot wars” punctuated the cold war era. Some of these were extremely bloody. But their locus was in the unstable, post-colonial peripheries of the world system. In the imperial age, the great powers fought each other and kept peace in their colonies. After the second world war, the great powers lived in peace with each other, while some of their former possessions were engulfed by violence, largely the result of de-colonisation. The UN’s role was confined to the sporadic provision of unarmed “peacekeepers,” there on the sufferance of the warring factions.

Renunciation of war as a method of settling disputes between the “civilised” powers remains. But an attempt is now under way to pacify the disordered parts of the world, from a mixture of fear, self-interest, and moralism. There is a strong whiff of the white man’s burden in the air. Yesterday’s peaceniks are transformed into today’s warriors.

Three changes in facts have liberated war from its cold war constraints. The first and most obvious is the collapse of the Soviet Union, which left the US as the sole superpower. The two Iraq wars, the Yugoslav war, and the Afghan war would probably have been too risky in cold war days. Secondly, globalisation has weakened the doctrinal hold of national sovereignty as a barrier to ‘coercive intervention’ into the domestic affairs of states. Finally, vast military superiority has removed the “body-bag” constraint. In the first four post-cold war wars, the US and its allies suffered almost no casualties. (The current problems experienced in ‘pacifying’ Iraq may be changing this perception)

In this permissive context, two specific motives for waging war have emerged. The first is transnational terrorism. 9/11 seemed to make obsolete the quest for security through deterrence. From the ruins of the World Trade Centre sprang the Bush doctrine of

preventive war—an ambitious programme of removing latent threats to US security by the promotion of “regime change.” The Iraq war of 2003 was the first fruit of this new strategic doctrine.

The second motive for making war is the much higher profile now given to the protection of human rights. Humanitarian concern has been vastly stimulated by an increased flow of information about suffering, particularly via television. In 1998 UN Secretary-General Kofi Annan said: “State frontiers should no longer be seen as watertight protection for war criminals or mass murderers’. The two motives are to some extent interdependent. The US, in particular, links the fight against terrorism to the battle for human rights and democracy.

But the freedom of the west to make war is far from absolute. It cannot contemplate war against strong non-western powers like China, Russia, or India. The world balance of power may have collapsed, but some regional balances remain intact: North Korea cannot be assailed with impunity, “rogue state” though it is, because of China. The west’s freedom to make war is also constrained by public opinion. The glamour has long gone out of war, killed off in the trenches in 1915. Western societies are inherently pacific; to be stirred out of their pacifism the cause has to be compelling. Moreover, there are many, particularly on the left, who argue that the return of war as a policy choice is tantamount to the revival of imperialism. And the doctrine of state sovereignty retains a powerful appeal.

What has been regained is the freedom to fight limited wars in some areas, where technological supremacy can secure swift victories at little cost to the victors. This opportunity to make war, coupled with the emergence of a set of motives for doing so, raises the question of when it is right to do so.

JUST WAR

The theologian James Turner Johnson calls the just war tradition a “moral tradition of justifiable and limited war.” Of Christian provenance, it may be distinguished from two other Christian approaches to war: pacifism and holy war. Pacifism must be rejected since war may be a way to a juster peace. But holy war—the Christian equivalent to the Muslim ‘jihad’- is equally wrong, since perfect justice is unattainable in this world.

Historically, the intellectual stimulus to curb unbridled force has been strongest in periods of imperial conquest or extreme lawlessness. The just war tradition, which originates in St Augustine’s City of God, was a compromise between the Christian Church and the Roman state. In the middle ages, Aquinas specified the conditions of a just war: “a war waged by a legitimate authority, for a cause in itself just, to make reparation for an injury or to restore what had been wrongly seized, and with the intention of advancing good and avoiding evil.” (Michael Howard, in J.B.Elshtain ed.. Just War, 1992, P.29) The modern tradition starts in the 16th century with the Spanish discussion of the moral and prudential justification of the Spanish conquest of Latin America.

In the Westphalian era which started in the 17th century, just war theory fell into abeyance. The sovereignty of states replaced the sovereignty of God: the state alone had the right to determine the extent of its legal and moral obligations. The problem of how to restrain sovereigns from attacking each other was partially solved de facto by the emergence of a “balance of power.” These restraints did not apply to the “unoccupied” or “barbaric” parts of the world, which were, by common assumption, not-sovereign. Discussion of the justice of war came to be largely confined to its conduct—with emphasis on the distinction between combatants and non-combatants and the need for force to be proportionate to aim. Much of the legacy of this discussion is enshrined in successive Geneva Conventions specifying treatment of prisoners and such like. “Rules of war,” fashioned for battles between professional armies, in turn broke down in the 20th century, as military technology and mass armies combined to make war “total,” with the object of

war shifting from the defeat of enemy forces to breaking down the resistance of the civilian population.

Today, a rich and sophisticated discussion over centuries is usually presented as a list of propositions covering three topics -jus ad bellum, jus in bello, and jus ad pacem. The first aims to determine whether a war is justly started, the second is concerned with the just conduct of the war, and the third—and most shadowy of the topics—explores the requirements of a just peace. The propositions support each other, like the bricks in an arch. Just war theory is not a scholastic exercise, but an invitation to moral argument.

The six requirements for a just recourse to war are: just cause, legitimate authority, last resort, proportionality between offence and response, reasonable chance of success, and right intention.

“Just cause” governs everything. An unjust war cannot be justly fought; it ought not be fought at all. The two justifiable aims of war are self-defence and protection of the innocent. Either could make war moral. However, to accommodate the Westphalian system of sovereign states, self-defence became virtually the sole criterion of justice, with “protection of the innocent” relegated to protection of non-combatants in war. In affirming the justice of war to protect innocent lives, just war theory sits well with the growing demand for a right to intervene to prevent humanitarian disasters.

Self-defence seems unproblematic. However, it is too elastic to be useful without qualification. Few would deny that it can include “pre-emption” if the threat of attack is clear and imminent. The problem arises if the threat of attack is seen as potential, arising from the character of the regime or group, as in the concept of the ‘rogue state’. When true security is said to require, as Tony Blair claimed in Chicago in 1999, universal democracy, self-defence can sound suspiciously like attack. The very existence of a dictatorship can be seen as a threat to security, justifying preventive war. This extension of the concept of self-defence was very evident in the Iraq war of last year.

Against this tendency to inflate the meaning of self-defence, just war theory erects two main barriers. The first is that for a war of self-defence to be just it has to be “clearly an act of redress of rights actually violated or defence against unjust demands backed by the threat of force” (JB Elshtain ed, 324). The standard of proof implied by such terms as “clear” and “imminent” is much higher than required for claiming that a threat is latent or potential. The badness of a state is not a just ground for waging war against it. It is what the state does. This sharply reduces the margin for error or lying. (The fact that the threat turns out not to have existed does not make the war in itself unjust, provided the mistake was honest and not just manufactured to justify the war.)

The second barrier, added by Aquinas, is “legitimate authority”. In his conception legitimate authority was split between rulers and church. In the Westphalian period rulers alone became the judges of whether wars were just. But in the UN Charter there is a revival of the older idea that a war has to be sanctioned by a higher authority. Signatories to the UN Charter recognise the UN itself as the legitimate war-authorising authority. In making war against Iraq in 2003, the British government at least felt constrained to argue that it was acting under a UN resolution “authorising” war.

The other criteria also seek to curb recourse to war. The “last resort” requirement expands the scope for negotiation. From the strategic point of view it often makes sense to go to war before all opportunities for negotiation have been exhausted, since prolonging negotiation might be interpreted as a sign of weakness. War was started in Kosovo (1999) and Iraq (2003) before negotiation had reached its endpoint.

Proportionate response is a strong defence against the “holy war” mentality. The proportionality criterion requires us to measure offence and response on some common scale. This is impossible if the things to be defended are values, since body counts and values are incommensurable. The strength of the just war tradition is that it limits what is to be protected to physical things such as lives, property, livelihood—the things most

obviously at risk from aggression. This is consistent with a pluralist view of the world. It is also consistent with humanitarian intervention to prevent physical harms like genocide, mass murder, mass starvation, torture. Blairite wars to establish freedom and democracy are not consistent with the just war tradition, as tending towards a “holy war” mentality.

The “reasonable chance of success” stipulation also sits naturally with “proportionate response.” The more unlimited one’s ambitions for war, the remoter one’s chance of achieving them. The “reasonable chance of success” criterion is relevant not just to the winning of a war but to the pacification of a country following a war. twenty months after President Bush declared “victory” in Iraq, Iraq is still far from having been pacified.

“Right intention” is a further support for “just cause.” One may be mistaken in one’s view of threats, but one must not intend war for any purpose other than self-defence or protection of innocent lives. In particular, one cannot use a good outcome to justify, in retrospect, a wrong intention. The fact that a war of aggression may produce good results—for example, a higher standard of living or a democratic government in the defeated country -does not justify it. The “right intention” criterion is based on the historical experience that, in general, wars of aggression, even if successful in their immediate aims, create more problems than they solve.

The two main criteria of just conduct of war are discrimination and proportionality: civilians (non-combatants) must never be deliberately attacked, and force must be proportionate to ends. The first, as has been mentioned, becomes possible again with the precise technology which limits “collateral damage.” Some of the older questions—when is a civilian to be legitimately regarded as a non-uniformed soldier?—have receded, at least for a time, in face of the awesome, but very precise, military means available to the technologically advanced.

The second criterion guards against overkill: the force used must be the minimum to achieve the goal desired. If war is made to “protect the innocent” then the military means should be proportional to that end. This criterion is clearly difficult to apply, since it depends on the military capacity of the war-maker. A badly-trained army is likely to kill more people (soldiers and civilians) than is a highly professional one.

A just peace must leave the situation better than it was before the war started. Conceivably this might suggest a “Carthaginian peace,” which takes its name from the physical destruction of Carthage and the liquidation of its people, which the Romans imposed following the third Punic war. The logic, of course, is that the physical elimination of the enemy, guarantees a non-recurrence of the war. A similar aim underlay the Morgenthau plan for the pastoralisation of Germany, which was (briefly) accepted by the three Allied war leaders in 1944. However, a “Carthaginian” peace is incompatible with “protection of the innocent.” The just war tradition favours a peace of reconciliation, not just on prudential grounds, but because it is the moral consequence of a war started for just cause.

The main usefulness of the just war tradition is that it provides a moral standard for judging the legitimacy of a recourse to violence. At a time when war has re-emerged as a “policy of choice” for the strong, it is important to revive the tradition of limits, if only to prevent the strong abusing the weak. Just war theory makes up for the lack of a balance of power.

It may be argued that moral restraint is already built into the conduct of civilised countries, without the need for recourse to an explicit moral checklist. But moral restraints on the spread of violence can be loosened, especially if war is seen as a moral crusade. Just war theory is a powerful antidote to the ‘neo-con’ division of the world into good and evil, with its demand for unlimited freedom to wage war to secure regime change.

State sovereignty is fragmenting but world government is still far off. The just war tradition, which accords, a real, but only relative, moral value to sovereign states, better captures the challenges of a globalising, but not yet single, world.

REFORM OF UNITED NATIONS

The UN system is not set up to deal with the problems posed by “rogue” and “failed” states. The first may be the source of latent threats to the security of others, producing a demand for preventive war. The second is the source of humanitarian disasters. The result is either that these problems are dealt with outside the UN framework, as in the Iraq war in 2003, or they are not tackled at all, as in Rwanda in 1994.

The inability of the UN to handle these two issues derives from the purposes for which it was formed. The UN Charter, signed in 1945, was largely a reaction to the aggression of Germany and its allies in the second world war. In Article 2 members pledge themselves to refrain from “the threat or use of force against the territorial integrity or political independence of any state...” and not to intervene in matters “which are essentially within the domestic jurisdiction of any state...”.

Under Chapter VII, the security council can authorise the use of force on determining that there exists a “threat to the peace, breach of the peace, or act of aggression” (Article 39) and that force is the only way of dealing with it. (Article 42). The quoted words give quite a wide latitude, but the situation the founding fathers sought to interdict was war or threatened war between member states. The charter transfers “rightful authority” to use force from the member state to the security council itself except for the “inherent right of individual or collective self-defence if an armed attack occurs against a member...” During the cold war the right of veto given to the five permanent members (the US, Soviet Union, Britain, China, France) was regularly used by the two superpowers to protect their clients. This made Chapter VII largely inoperative.

The protection of member states against acts of aggression was thus the main purpose of the UN. The question of the domestic behaviour of those states was a secondary issue. However, the atrocious behaviour of Nazi Germany did put human rights on the agenda. The Universal Declaration of Human Rights approved by the general assembly in 1948 set out minimum human rights—freedom from discrimination on the basis of race or sex, rights to life, liberty and security of person, rights to be free from slavery, torture or inhuman treatment. Subsequent treaties and covenants have amplified these. A convention on the prevention and punishment of the crime of genocide came into force in 1951, and a convention on torture in 1984 has been ratified by 110 states. The UN has a standing commission on human rights.

The important point, though, was that crimes of this character are not a ground for Chapter VII action. Human rights were to be protected by economic and diplomatic pressure, and their abuse punished the courts, not by military action, unless they constituted a “threat to international peace.” This remains the situation, with an international criminal court now set up to try individuals for “crimes against humanity.” Thus of the two grounds for war recognised by the just war tradition, self-defence and protection of the innocent, the UN charter recognises the first, but not the second.

The question today is whether a collective security system set up to protect states against would-be conquerors can become an instrument for qualifying state sovereignty to make the world a better place. If it can't be, the UN will become an irrelevance, with military actions undertaken without reference to it—as happened to the League of Nations. The answer hinges on how far the member states are willing to recognise circumstances other than overt acts of aggression as legitimate grounds for resorting to war.

US rhetoric to the contrary, the “war on terrorism” raises no new issues for the UN—as was shown when the security council authorised the attack on Afghanistan. As early as 1954, the International Law Commission, recognised a clear threat to the “peace and security of mankind” from a state which allowed its territory to be used as a base for terrorist attacks on other states.(Article 2, Draft code of offences against the peace and security of mankind, UN.gaor, doc.A /2693) In the cold war era, states which harboured terrorists were able to get away with it, but there is no reason why they should today. States which knowingly sponsor terrorist groups can be sanctioned by the security council under Chapter VII. Terrorism, though, is more likely come from within the states which the terrorists wish to attack: this is a problem for domestic (and international) police work, not for Chapter VII action.

A more contentious issue concerns the right of “pre-emptive” or “anticipatory” attack. “Pre-emption” is recognised by customary law—and the just war tradition—as part of the “inherent right of self-defence.” However, by well-established convention, the threat of armed attack must be “imminent., ” requiring evidence not only of the possession of weapons but also of an intention to use them. Self-defence cannot justly be stretched to cover preventive war, aimed, for example, at overthrowing an unsavoury state which has a nuclear weapons programme.. The problem is that in such a case evidence of intent and capacity which might justify a pre-emptive war is nearly always lacking, and anyway open to argument. The war against Iraq in 2003 was a preventive war dressed up as a pre-emptive one. As such it falls foul of the “just war” criterion of self-defence, and was also illegal in terms of the UN charter.

True enough, the security council’s power to order military action is not limited by any requirement that the “threat to peace” be imminent. However, it is highly unlikely that IT would ever authorise a preventive war, for the same reason that preventive war falls outside the just war tradition—the evidence requirement is too severe. Also, the precedent would be too disturbing.

However, there are ways of preventing situations arising which would lead to the demand for a preventive war. The most obvious is to stop the spread of weapons of mass destruction. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (1968), bound all the then non-nuclear weapon states not to acquire nuclear weapons, and all the nuclear ones to eliminate them. This bargain has not been kept. The nuclear states have not disarmed; Israel, India, and Pakistan did not ratify the treaty, and proceeded to acquire nuclear weapons (Israel has not admitted this); in 2003 North Korea withdrew from the NPT; other signatories, notably South Africa, Iraq, Iran, and Libya developed clandestine nuclear weapons programmes. The UN system is unable to prevent determined proliferators from acquiring nuclear weapons. The Biological and Chemical Weapons Conventions are virtually dead letters.

However, if the political will were there, it would not be too difficult to convert the present incomplete patchwork of voluntary renunciations into a binding and effectively policed WMD regime, covering the whole world. Latin America and Africa are already nuclear-free zones. Diplomatic and economic pressure should suffice to get North Korea and Iran to renounce their nuclear ambitions, as South Africa and Libya have already renounced theirs. Similar freezes could be applied to biological and chemical weapons. Any reported breach in the agreements would automatically trigger UN sanctions. This proposal has the disadvantage of leaving the present possessors with a monopoly of the most deadly weapons. But a pacific hegemony of the nuclear powers is surely better than the US fighting a succession of preventive wars. And if a secure non-proliferation regime can be established, existing stockpiles of WMD can be gradually eliminated.

Such a regime would probably be acceptable everywhere except in the middle east. Arab nations will not give up their nuclear ambitions as long as Israel has the bomb; and Israel will not give up the bomb as long as it feels threatened by its neighbours. Therefore

there can be no nuclear-free zone in the middle east until the outstanding Arab-Israeli issues are settled. This is not likely to happen soon. Until it does the middle east will remain the world's powder keg.

In the Westphalian era protection of the innocent was the responsibility of states. The UN charter was crafted in this tradition; the conventions which proscribe genocide and torture provide only legal redress against its perpetrators. The Rwandan genocide of 1994, followed by other, less traumatic, episodes, shattered the assumptions of this doctrine. As UN Secretary-General Kofi Annan put it: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"

The International Commission on Intervention and State Sovereignty, set up by the Canadian government after the Kosovo war, issued a report in 2001 called "The Responsibility to Protect: the International Duty to Defend the Vulnerable." This seeks to transfer the ultimate duty for protecting the innocent from states to the international community. Following the just war logic, described above, it outlined an interlocking set of six criteria for military intervention for humanitarian purposes: just cause, right intention, last resort, proportional means, reasonable prospects of success, and right authority.

The just cause threshold was set deliberately high. For military intervention to be justified, there have to be occurring or imminently likely: (a) "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation," or (b) "large scale 'ethnic cleansing,' actual or apprehended, forced expulsion, acts of terror or rape." Two other aspects of the report should be noticed. First, "protection" implies more than "intervention." It requires prevention, reaction, and rebuilding. "A proper understanding of the responsibility to protect by the international community will thus cover the range of issues from early warning to post-conflict reconstruction." Secondly, "There is no better or more appropriate body than the United Nations security council to authorise military intervention for human protection purposes. The task is not find alternatives to the security council as a source of authority, but to make the security council work better than it has."

As we have seen, abuse of human rights is not a ground for military intervention under the charter. The logical answer would be to amend the charter to allow for it. But this is not practical: an amendment would need to be ratified by states which might themselves become targets for humanitarian intervention. The only practicable way forward is to proceed on a case law basis, in which interventions such as in Kosovo become precedents for subsequent action.

A second problem, not fully recognised by the Canadian report, is that prevention of genocide, mass murder, or mass starvation runs into the same problem of evidence as with other claims to wage preventive war. In practice prevention means stopping a disaster which is already happening. But this at least is better than letting it run its natural course.

What the report does recognise is that protection of human rights may require a long-term commitment to the country in which they have been violated. It is not just a case of post-war reconstruction, but the construction of a viable state which can protect human rights for the long term. The UN has a mechanism, the trusteeship council, which in principle could be used for this purpose. It is the successor of the League of Nations mandate system, set up in 1920 to administer the colonial territories of the defeated central powers. The trustee undertakes a variety of responsibilities which include "political, economic, social and educational advancement" and "respect for human rights and for fundamental freedoms for all." The trusteeship may be held by a single state, a group of states, or by the UN itself; and it may be terminated in accordance with the "freely expressed wishes of the peoples concerned." The trusteeship was intended as a staging

post between colonial status and full independence. It is very hard to reverse the process, but in fact UN trusteeships were established in 1999 in Kosovo and East Timor. (Although falling outside the humanitarian frame, a prime candidate for a UN trusteeship today is Palestine, in partial restoration of the old League of Nations mandate.)

A consensus is developing that it is best to handle humanitarian interventions as part of regional security systems. This vests responsibility for maintaining peace in a region on its main regional powers, acting on a mandate from the security council. This has the advantage of removing any suspicion of a new colonialism, and also provides a sensible division of labour between the US and other countries.

There is no reason, for example, for the US to be involved in Africa. The African Union has recently adopted a charter which allows “coercive interventions” in states whose authorities are carrying out genocide or mass murder. On the initiative of Nigeria and South Africa, it is to set up five regional brigades of 3,000 troops, based on national battalions which are to train together. These plans partly mirror the EU’s efforts to create a “rapid reaction force.” Unfortunately, the African states lack the money to train or transport the putative intervention force. This essential logistical support could be provided by the EU.

From these messy beginnings precedents are being established whereby humanitarian interventions are carried out by specially trained and equipped regional forces, followed by the installation of a temporary UN civilian administration.

CONCLUSION

What conclusions can be drawn from this survey? The most important is that force remains necessary for general peace and security. The end of the cold war has given the US and its allies a limited discretion to use force. Just war theory offers the chance for subjecting the use of force to rules. A great part of the UN charter is consistent with the just war tradition. But it was set up to protect states against external aggression. A Westphalian document needs to be turned into a just war charter.

There is no way in which the current US demand for the right to make preventive war can be brought within the framework of the charter, or indeed of the “just war” tradition. As Kofi Annan said in September 2003: “This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years.” However, the problem can be finessed by the establishment and rigorous enforcement of a non-proliferation weapons regime. Recognition of the need for such a regime may be the best result of the Iraq war. The duty to protect the innocent, even against their own governments, when the scale of atrocities shocks the world’s conscience, is now close to becoming accepted doctrine. Little by little, and too timidly, the aims and methods of such humanitarian interventions are being worked out, as part of the larger project of providing for good government, economic development and poverty elimination in some of the poorest countries in the world.

A CASE FOR THE MORALITY OF THE IRAQ WAR

The doctrine of just war provides the most developed set of tools for the moral analysis of war, and for distinguishing between its just and its unjust forms. It is therefore quite appropriate that our conference today takes it as one of its main points of reference in reflecting on the morality of the Iraq war. Let me begin, therefore, with some remarks on this doctrine and its conceptual hinterland.

First, just war theory shares with pacifism the view that war is an evil — that is to say, it is destructive of forms of human flourishing — and that therefore there is a presumption that it should be avoided but not avoided at all costs; for sometimes — and tragically — the use of armed force is the only effective way of curbing the growth of injustice.

This is my second point. Here the doctrine of just war betrays its Christian — and more specifically, Augustinian — provenance. For in contrast to the Enlightenment it does not assume that human aggressiveness can be curbed by yet another dose of sweet reason. Sometimes political leaders simply don't want a just peace. They just want advantage. Nevertheless, malevolence is familiar to every human being, even though its origins remain largely obscure and culpability escapes all but crude measures. Therefore — and here comes point three — armed force can never be justified as a messianic attempt to annihilate the unrighteous and to purify the world. Just war is never more than a police action conducted by one set of sinners to curb the wrongdoing of another. Just war is never holy war.

This brings us to our fourth and final remark on the doctrine of just war. Morally permissible use of armed force is better described as 'justified' rather than 'just'—and, to its credit, the title of our conference is alert to this point. No human endeavour, certainly not war, is ever morally pure—which is not to say that it isn't justified. Moral justification is compatible with the presence of some morally dubious or intolerable elements. Some, not all: the challenge is to discern which, and to explain why.

So much for just war doctrine in general. My task now is to present a case for the moral justification of the Iraq war in terms of the criteria that it furnishes.

The first requirement of a justified war is that its cause be just. What makes it so is that its reasons are sufficiently strong — morally speaking — to warrant incurring the very grave evils of war. So, for example, the tradition of just war excludes the desire for sheer aggrandisement, whether motivated by greed or even by a sense of insecurity. To be just, engagement in war must be a response to an injury. Moreover, the injury must be serious: the defence of wounded pride or slighted honour are not adequate as just causes. (Here again the tradition reveals its Christian provenance, since there are plenty of other ethics that regard such defence as absolutely mandatory.)

The causes or reasons for the invasion of Iraq were multiple. First, the regime of Saddam Hussein had a record of domestic atrocity: according to Western human rights groups at least 300,000 people had been murdered by the regime since 1991 (Shawcross, p. 160). Some have argued that this is not plausible as a reason for invading Iraq, since there are other parts of the world with a greater claim to the benefits of humanitarian intervention but for whose liberation the coalition governments have shown little concern. One answer to this is that the gravity of human rights violation is not the only determinant of the morality of intervention. There are also prudential considerations. Not all interventions have equally good prospects of success and some incur far greater risks of

escalation—and so of disproportionate evil—than others. There were good reasons why NATO did not intervene in Hungary in 1956 and in Czechoslovakia in 1968. And there are good reasons why the US does not intervene in Chechnya now. Besides, even if action in Iraq cannot be squared ethically with inaction elsewhere, it is surely better to be inconsistently responsible than consistently irresponsible. Enough said of the first reason or cause for invasion—Iraq’s domestic record.

A second reason is that it had a record of aggression in a very fragile region of global economic importance.

Third, a record of serial defiance of 16 binding UN resolutions (Shawcross, p. 104) requiring it to “unconditionally accept the destruction, removal, rendering harmless under international supervision” of chemical and biological weapons and of all ballistic missiles with a range greater than 150 km (Resolution 687 [1991], quoted by Shawcross, p.113)

Fourth and finally, it was widely believed that since the Gulf war Iraq continued to possess illegal weapons and was intent on acquiring nuclear ones. This belief was not just the obsession of British and American governments. Since 2001 German intelligence had held that Iraq was only two to three years away from having at least one nuclear weapon (Shawcross, p. 151). In its 2002 report, the International Institute for Strategic Studies judged that “[t]he retention of WMD capacities by Iraq is self-evidently the core objective of the regime, for it has sacrificed all other domestic and foreign policy goals to this singular aim” (IISS, reported in the Guardian, 10 September 2002); and it reckoned that, with external help in acquiring fissile material, Iraq could develop nuclear weapons with 12 months (IISS, p. ??). In February 2003, Jacques Chirac told Time magazine, “There is a problem—the probable possession of weapons of mass destruction by an uncontrollable country, Iraq. The international community is right ... in having decided Iraq should be disarmed” (Pollack, “Spies, Lies, and Weapons”, p. 3). And then, writing in 2004 of his views before the invasion, Hans Blix confesses that “[m]y gut feelings ... suggested to me that Iraq still engaged in prohibited activities and retained prohibited items, and that he had the documents to prove it” (Blix, p. 112); and in January 2003 he reported to the Security Council that “Iraq appears not to have come to a genuine acceptance — not even today — of the disarmament which was demanded of it and which it needs to carry out to win the confidence of the world and to live in peace” (Blix, p. 138).

Although the belief that Iraq retained illegal weapons and was within reach of obtaining nuclear ones now appears to have been mistaken, it was nonetheless reasonable. It was reasonable given three things: first, the shocking revelation in the mid-1990s that before the Gulf war Iraq had managed to enrich uranium without being detected (Blix, p. 24) and that it had been only six to twenty-four months away from having a nuclear weapon (Pollack, “Spies etc.”, p. 8); second, the regime’s constant resistance — right up until the very eve of war — to the UN’s attempts to assure the international community of Iraq’s disarmament; and third, the lack of any good reason to give the Saddam regime the benefit of doubt.

Having morally good reasons or motives for going to war is necessary, according to the doctrine of justified war, but it isn’t sufficient. We also need to have right intentions or worthy goals. The injury that you have inflicted on me may warrant my using armed force against you — but it doesn’t warrant my using armed force, for example, to wreak vengeance on you. The aim of justified war must be a just peace, not the vindictive annihilation of the enemy.

What was the aim of the coalition forces in invading? Again, there were several. One was to remove a reasonably perceived threat, not just or most immediately to the US or Britain, but also to other states in the region — and pre-eminently Israel, but also the Gulf states and Saudi Arabia.

Another was to help create 'responsible' government in Iraq, thereby to demonstrate the possibility of an Arab alternative to repressive government, and thereby to address one of the main springs of discontent that feeds radical Islamism.

A third aim was to remove US forces from Saudi Arabia — placed there after the Gulf war to deter Iraq—and thereby to remove a major Islamist grievance: the presence of infidel troops in the land of Mecca.

In addition to just cause and right intention, the justification of war also requires that it be authorised by a 'legitimate' authority. My understanding of the rationale of this requirement is that war should be undertaken for the public or common good, and not for the satisfaction of narrowly private lusts for vengeance or dominance. It is this public concern that constitutes an authority as morally legitimate.

How does the Iraq invasion measure up against this criterion? The first things to say is that whatever narrowly national security interests of Britain and America the toppling of the Saddam regime served, it also served the legitimate interests of the Iraqi people, of Israel, and of other states—and their peoples—in the region.

As for the standing of the invasion before international law, that is a moot point, and one which we will explore this afternoon. Suffice it to say at this point that the lack of UN backing may be taken to weaken the moral legitimacy of the invasion insofar as the collective will of the UN has claim to represent the interests of the common good—and there is reason to suppose that the dominant concerns about Iraq of at least some prominent members of the UN were domestic rather than common. I think here especially of France with its economic interests in Iraq, its anxieties about its own Muslim population, and its traditional ambition to forge Europe into a power able to rival Anglo-Saxondom.

Further, while it is true that the cavalier violation of the spirit of international law by any powerful nation is bound to weaken its universal authority, action that infringes some of the letters of the law need not.

Further still, while it is true that certain kinds of transgression of the law weaken its authority, it is no less true that its authority is weakened by a chronic failure to enforce it. Think Rwanda. Think Srebrenica. Think Iraq.

A fourth criterion of justified war is that it be a last resort. This is not a requirement that everything else be tried before war is attempted. It is only a requirement that every effective alternative be tried. In the case of Iraq, there were no effective alternatives.

Containment was collapsing beyond repair. Since 1997 France, Russia, and China had pressed for a relaxation of sanctions and inspections, in order to obtain oil and military contracts and collect debts owed; and by rampant smuggling worth more than \$3b per annum to Iraq, conducted by Syria, Turkey, Jordan, and Iran (Pollack, *Threatening Storm*, pp.). Besides, as Peter Baehr has written, containment is at best only a short-term measure since "[t]he unanimity of interest and durability of resolve that are required to institutionalize it do not exist in the real world of geopolitics" (Baehr, p.).

What is true of containment generally is also true of inspections in particular. Hans Blix is frank in admitting that without the Coalition's build-up of an invasion force in the summer of 2002 "Iraq would probably not have accepted the resumption of inspections" (Blix, p. 11). He is also frank in recognising that "the US could not keep troops idling in the area for months" in rising temperatures (Blix, pp. 130, 14), that "the actual use of this force could only be avoided through some spectacular development that assured the US and the world about disarmament in Iraq" (Blix, p. 146), and that "while inspectors only have to find out, analyze and report factually, governments often have to take action and cannot always allow themselves the luxury of waiting until the factual and analytical basis for decisions is complete and certain" (Blix, p. 157). Since, by his own admission, the 'spectacular development' necessary to stave off invasion was not forthcoming, his own judgment that inspections should have been given more time has little more substance than wishful thinking (Blix, pp. 11-12).

The fifth and final criterion of the justification of engaging in war that I'm going to discuss is the requirement that there be a reasonable prospect of success. The thinking behind this is that the grave evils of war are only worth incurring if there is a good chance that the goods for which it would be fought might actually be achieved.

The Coalition's aims regarding Iraq were to topple the Saddam regime and to replace it with a more responsible and stable government. Before the invasion was launched there were reasonable prospects that both aims could be achieved. There was never any serious doubt that the US had the military power to dislodge the regime. As for 'democratic' reconstruction, it had succeeded before—e.g., in Japan and Germany after WW2—and given that of all Arab states Iraq is best endowed with oil, optimal agricultural conditions, and an educated and 'secular' people, there was reason to suppose that it could succeed there too. Besides, under the protection of the No Fly Zone, Kurdistan had already begun to attempt parliamentary life (Ajami).

It is true that the business of reconstruction has proven much more fraught than expected, partly due to hubristic over-confidence, inadequate planning, and subsequent policy mistakes on the part of the US authorities. However, given the ruthless, nihilistic, and sectarian nature of much of the resistance—for whom fellow Iraqis and UN personnel are as fair game as Coalition troops—anyone who really cares for the future well-being of the people of Iraq must hope that the Coalition forces learn from their mistakes and succeed in overcoming it.

All of the criteria that I have discussed so far—just cause, right intention, legitimate authority, last resort, prospect of success—bear upon the decision to engage in warfare. There are also two further criteria that apply to the process of waging war. One of these is the requirement of 'proportionality' in the use of force, and before I close I need to discuss it for reasons that will shortly become apparent.

The concern of this requirement is that only such force be used as is strictly necessary to achieve military aims, which are themselves necessary to achieve a just peace. Any significantly excessive force must serve other goals, such as the gratification of the lust for vengeance—or of the lust for domination. The gratuitous humiliation of prisoners of war is one form that such excessive force can take: it serves no military purpose and it is likely to inspire longstanding hatred that can do nothing but harm to the prospects of peace.

Which raises the question: Does the revelation of the abuse of POWs by US forces "blow away", as the leader-writer of last Saturday's Financial Times put it, the rationale for the invasion of Iraq in the restoration of human rights and the rule of law (15/16 May 2004)? No, it doesn't, any more than the arguably vindictive bombing of Dresden reduced the Allied cause to the moral equivalent of the Nazi's. Certainly such abuse does considerable political damage, but it would only subvert the moral justification of the war if it could be shown to be integral to military and political strategy; and the fact that it has been publicly repudiated by the US military and government, and that steps are being taken to stop it and to punish those responsible, suggests that it is not.

Matthew Hassan Kukah, *Catholic Reverend Father; Visiting Fellow, Harvard University; former Secretary General of the Catholic Secretariat in Nigeria*

A CASE AGAINST THE MORALITY OF THE IRAQ WAR

Abstract

This paper progresses from the fact that presumption against war is a tenable option in dealing with the issue of the morality of war against the backdrop of the Just war theory. As such, to answer the question posed, No, I do not find a moral basis for this war. But, the issues I know are more complicated than that. Indeed, even at the best of times, the Just War theory had fallen into disrepute thanks to the manipulation of tyrants and warmongers. At the time it was propounded, God was the Sovereign and it was to Him that recourse had to be made. This was on the assumption that he created the world and that we are all here to do His will. However, since man as it were, dethroned God and subsequently crowned himself Sovereign, the issue of what constitutes the basis for going to war has become subordinated to the arbitrary judgement of the human sovereign. Against the background of my personal cynicism, the Iraq war therefore merely provides us with a *fait accompli* because it has since shown us what is wrong and immoral about any war and why lies and damn lies, greed, megalomania and human pomposity remain the only basis for sustaining wars today. This line of thinking will form the basis for this paper.

First of all, I will explain why I believe that presumption against war is at the heart of the Just War theory. I will do this against the backdrop of the six kernels and provisions of the theory itself. Secondly, I will review the Just war theory against the backdrop of our collective experiences of the war in the last 50 or so years or war mongering. Thirdly, I will argue that what we need is a moral road map for achieving world peace, believing as I do that war will never solve the problems of the world. In doing this, I will have recourse to some of the principles that have been clearly enunciated by the United Nations and further expounded by Catholic Church especially through some of the prominent Encyclicals of Pope John Paul II and his predecessors on the issues of war. I will argue that war, whatever may be the nobility of its claims, is to my mind the highest manifestation of human sin and the worst expression of the negative side of the human person. Although what I propose is based on some of the teachings of the Catholic Church, the issues are broad enough to cover our common humanity as enunciated in the principles of the United Nations. Finally, I will conclude by drawing attention to the implications of these developments for those I call the children of a lesser god, namely, the majority of the peoples of the developing world whose territories seem condemned to be the theatres of any war now or in the future.

Professor Timothy Garden, *former Air Marshal and former Director of the Royal Institute of International Affairs*

APPLICATION OF THE JUST WAR THEORY TO THE IRAQ WAR

Abstract

Even in the military we teach the just war theory. It is an incredibly useful analytical tool. I was sparked by Professor Nigel Biggar – I disagreed with every element of what his argument and came to the reserve conclusion.

The questions I would ask someone who studied just war theory more closely:

How important is it that you were clear what you were going to war for in the first place? This is because much of what has been said was post-war justification. Up until the last minute the government was saying that if Saddam complied with the UN resolutions then he would stay. So, it was not regime change from the British point of view. If you now make just war analysis on the ground of that was what that was for, we are creating a mess of the arguments.

How much does it matter about time scales? You use the question of domestic atrocities (300,000 deaths). Now, I would have supported, under just war theory, an operation in Iraq in 1998. I would have supported it when Shia and the Kurds rose up after the First Gulf War and that is when most of them were killed. But 10 or 12 years later when things have settled down and Saddam is not killing vast numbers of people, can you justify a war through historical roots?

Then there is the record of aggression. But when Saddam did the aggression, we responded, took side of Kuwait and deterred further aggression. Do you then say that the deterrence is no longer working? Of course, it is working. Saddam was not a threat to his neighbours after that.

Then there is defiance of resolutions. It is only important if UN Security Council stands up and says “you have defied the resolutions to such an extent that all necessary means may be used”. And that is why the second resolution did not appear as being so important. Nobody believed that Saddam was anywhere near a capability of reconstituting his nuclear ability. It did not matter who you have talked to, it was clear that we had dismembered a vast infrastructure in the 1990s, and it would have taken years to fully recover it.

When you talk about what public think you talked about the Iraqi people. What about populations of countries that are going to war? Does it matter what they think in just war theory?

Last resort. Containment was working better than we ever knew. It was not working just reasonably well. It was working so well that it completely undermined military infrastructure – it could not pile up weapons, it could not hide them.

Reasonable prospect of success. Everybody was optimistic before they were going into war and then they explain why they got it wrong after. Yet, many others went to seminars here and in the US in the year before where they were talking about “the day after” and they could not believe the degree of optimism. There was no plans B for if it went wrong! Do you still have a moral justification if you had not thought through the consequences?

Proportionality. Let’s not worry too much about the photographs from the prisons. But we saw AC130 gun ships used against urban rebels in order to reduce insurgency. Is this proportional? Does this affect your overall conclusions?

Overall, just war theory seems to be a good way to bring the issues out but in the end the most important thing is to have a rule based system that is clear and enforced.

TERRORISM AND ROGUE STATES: REFLECTIONS ON INTERNATIONAL LAW ISSUES

1. The definition of terrorism as a crime under international law

It is usually said that there is no clear definition of terrorism in international law. This essentially means that there is no general treaty offering a broad definition of the concept. Basically, many States – particularly in the Third World – oppose such an agreement because of political and ideological implications that arise when acts which some States consider terrorism are by others considered the expression of their right to self-determination. Terrorism, fundamentalism, fanaticism, extremism, criminality, resistance, national liberation are controversial in politics and, as a direct consequence, in international law. The inability of the United Nations to adopt a general international definition reflects most of the contradictions within the international community¹.

But this does not mean that the notion of terrorism is unknown in international law.

The Geneva Convention of November 16th 1937 never entered into force. Nevertheless it contained a general definition and a rather detailed enumeration of acts. Under the general definition, emphasis was placed on the fact that terrorism consisted in “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or the general public”².

Several other treaties make reference to this crime. Article 33.1 of the Fourth Geneva Convention on the protection of civilians provides that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited”. Article 4. 2. d of the Second Additional Protocol on internal armed conflicts prohibits “acts of terrorism (...) at any time and in any place whatsoever”. In line with this provision, the Statute of the International Criminal Tribunal for Rwanda, in Article 4, extends jurisdiction over acts of terrorism.

Another definition is provided in the Convention for the Suppression of the Financing of Terrorism, adopted by the UN General Assembly in 1999. After having recalled nine treaties listed in the Annex (each one makes specific reference to different kinds of acts), Article 2. b specifies that it means any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to obtain from doing an act”. The perpetrator is “blind”, he does not choose the victim because of his/her sex, age, nationality, religion, social conditions. He attacks at random, having a (not always clear and explicit) political, religious, ideological purpose³.

¹ See C. BOURGUES HABIF, *Le terrorisme international*, in H. ASCENSIO – E. DECAUX – A. PELLET, *Droit international pénal*, Paris 2000, p. 457. See also International Institute of Humanitarian Law and George C. Marshall European Center for Security Studies, *Terrorism and International law. Challenges and Responses*, Sanremo 2003; K. BANNELIER – T. CHRISTAKIS – O. CORTEN – B. DELCOURT (sous la direction de), *Le droit international face au terrorisme*, Paris 2002; A. DE GUTTRY (a cura di), *Oltre la reazione. Complessità e limiti nella guerra al terrorismo internazionale dopo l'11 settembre*, Pisa 2003.

² See League of Nations Doc. C.546.M.383.1937. In French, the wording is different: “don't le but ou la nature est de provoquer le terreur”.

³ See A. CASSESE, *International Criminal Law*, Oxford 2003, p. 125.

If we put together these various sources, we can conclude that although we lack a general definition within the framework of a general treaty, we have several treaties which refer to terrorism and outline some of its characteristics⁴. This has produced a situation in which we can accept the idea that terrorism is a crime both under treaty law and under customary law.

As a crime under international law, an act of terrorism must aim at spreading terror (fear and intimidation) “by means of violent action or the threat thereof directed against a State, the public or particular group of persons”, and must be “politically, religiously or otherwise ideologically motivated, and not motivated by the pursuit of private ends”⁵. These acts are of a violent nature, are the result of individual or collective initiative, and can consist in murder, taking of hostages, kidnapping, bombing, hijacking and all those acts which are the object of particular treaties and which are considered crimes in national legal systems⁶.

Many acts fall under the provisions of domestic laws, since they lack the character of an international offence. To be “international” they must transcend boundaries, have a trans-national character, because of the victims or the means employed. Moreover, contemporary terrorism demonstrate that often these acts are carried out with the acquiescence or even the open support of sovereign States, and the result is a large scale attack. This complex of elements make them acts of “concern for the whole international community and a threat to the peace”⁷.

All these elements have been confirmed by a number of relevant UN General Assembly Resolutions since September 11th 2001.

We can therefore conclude that there is widespread consensus in the international community (multilateral treaties, resolutions of international organisations, statements by States, unilateral action by States), and that terrorism can be considered a crime prohibited by customary international law. As a consequence, any State is entitled to bring to trial the perpetrators of acts committed in its territory.

Certain acts are considered war crimes “under international law” because they are committed in the context of an armed conflict⁸. Their targets are civilians or civilian property, and they have the two elements of *actus reus* and *mens rea*. The *mens rea* is the intent to carry out unlawful acts or violence against civilians. In the Galic case before the International Criminal Tribunal for the Former Yugoslavia, a Bosnian Serb major general was accused of spreading terror and held responsible for the organisation of the sniping and shelling of civilians in Sarajevo. Other acts fall within the category of crimes against humanity because they are objectively a part of a widespread or systematic attack against any civilian population and are committed with intent⁹. If the Statutes of international tribunals (the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court) state that crimes against humanity are only those acts committed against civilians, customary law extends the scope to military personnel. In this perspective, the crashing of an aircraft into the Pentagon can be considered as a part of a widespread or systematic attack against the US population (including both civilians and military personnel)¹⁰.

⁴ See the *United Nations Treaty Series* and *International Legal Materials*; see also United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism*, New York 2001; R. BARBERINI – G. R. BELLELLI, *Codice delle convenzioni internazionali e della legislazione italiana sul terrorismo*, Rome 2003.

⁵ See A. CASSESE, *cit.*, p. 120 and ID, *International Criminal Law*, in M.D. EVANS, *International Law*, Oxford 2003, p. 752.

⁶ See G. GUILLAUME, *Terrorism et droit international*, in *Recueil des Cours de l'Académie de droit international de la Haye*, 1989, III, 215, pp. 287-416.

⁷ See A. CASSESE, *cit.*, in M. D. EVANS, *cit.*, p. 753.

⁸ See E. GREPPI, *I crimini di guerra e contro l'umanità nel diritto internazionale*, Torino 2001.

⁹ Articles 8 (War Crimes) and 7 (Crimes against Humanity) of the Rome Statute of the International Criminal Court.

¹⁰ See A. CASSESE, *cit.*, 120.

Having said all this, we can nevertheless conclude that – even if not strictly necessary – the international community should be oriented to the adoption of a broad and clear definition. And moreover, beyond definitions, international law should provide for means of action. “Where international law fails is at the enforcement level”¹¹.

The existence of several “sectorial” or regional treaties does not compensate for the lack of a generally accepted instrument with a wide perspective, which should provide a definition and a general set of rules governing the suppression of this crime and establishing precise obligations upon States (which under customary law are often merely “allowed” to punish wrongdoers but not “obliged” to).

2. Terrorists and Rogue States

There are a few elements which should be taken into account when we approach the role of the so-called “Rogue States” in terrorism.

First of all, the concept of “Rogue States” is a political one, and does not reflect a clearly defined legal category. We can consider as “rogue” a State which agrees to be legally bound by rules established in the international community (both customs and treaties to which is a contracting party), but at the same time takes initiatives which are not compatible with those obligations. In particular, this State offers open or covert support to terrorist organisations and/or develops weapons which are prohibited by multilateral treaties, and as a threat to international peace and security.

If we consider the events of September 11th 2001, the relationship between terrorism and “Rogue States” was quite clear. There was proof of the close links between Al Qaeda and Afghanistan. There were plenty of United Nations Security Council Resolutions condemning the Taliban Government for its open support of that terrorist organisation. Last but not least, it was politically and legally comparatively easy to decide actions against a Government which was only recognised by two or three States within the international community.

Cases such as that of the March 11th 2004 attack are different and much more problematic. Who were the “Rogue States” involved? Probably more than one! But none showed a clear and unquestionable link with that specific crime. And no State appeared on the scene as accountable and against which Spain could launch an attack.

Under international law we can distinguish two cases. First, terrorist acts are perpetrated by individuals acting in their private capacity (as members of a group or organisation). Second, they are committed by State officials in their public capacity. In the second case, State responsibility has been clearly established for a long time, along with individual criminal liability.

The first case is more recent, in which State responsibility arises because a State acquiesces, tolerates and even supports openly the organisation which plans, organises, and commits terrorist acts in another State.

A State sponsoring terrorism is difficult to fight if the international community stays strictly within the limits of the Westphalian order and concept. Even the expression “war on terrorism” is little more than a slogan, because traditionally war implies a State actor as an enemy, fighting in the open field. In the Westphalian tradition war was “declared”. Terrorism and its “rogue States” sponsors do not declare a war. An efficient fight requires more subtle tools: diplomacy, the collective use of force, judicial remedies.

Only international co-operation among States enables terrorism to be fought in an effective way. This co-operation implies joint action consisting in police measures (starting

¹¹ *Ibidem*, p. 130.

from exchange of information), in diplomatic steps (negotiations, joint declarations and statements) and in the adoption of new multilateral conventions¹².

3. Terrorism and the judiciary

As far as the judicial remedies are concerned, generally we can say that extradition and the principle “aut dedere aut judicare” should apply.

In the last decade we have seen significant progress in the field of international criminal justice.

Two ad hoc international Tribunals were created in the Nineties, and recently a permanent International Criminal Court was established.

They have jurisdiction over the crime of genocide, crimes against humanity and war crimes. In the negotiations of the Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court (Rome, June 15th – July 17th 1998) the so-called Treaty-based crimes were not included. This seems rather curious, since the 1937 Geneva Convention had first envisaged the creation of an International Criminal Court as a guarantee to eradicate international terrorism.

There is still need for a broader consensus in the international community. As a consequence, terrorist acts are not included among the crimes under international law. They remain essentially placed under domestic jurisdiction, and it is more than obvious that “Rogue States” have no intention to try and punish their perpetrators.

It is clear, in any case, that September 11th and March 11th are to be considered crimes against humanity. According to the definition of Article 7 of the Rome Statute, they are acts committed intentionally as a part of a widespread or systematic attack against a civilian population. This could 'push' in the direction of the exercise of international jurisdiction over such crimes, in the limits of the complementary principle adopted by the Rome Statute.

One point should never be questioned: individuals responsible for acts of terrorism should be caught and brought to trial, and States exporting terrorism are responsible under international law, and the international community has the right to adopt both measures involving the use of force and judicial responses under UN Charter provisions.

4. The need for new legal instruments and institutional reform to face terrorism and rogue States

Basically, the problem is that we still lack a general legal conventional instrument offering not only a clear and broadly accepted definition of terrorism (as we have seen it already belongs to customary law) but also a generally accepted set of rules to fight it in an effective way. Moreover, we lack a concept which takes into account the fact that the relationship between terrorists and States has changed. In the past, terrorists were more or less isolated individuals, planning their actions in a limited environment, and with limited targets (a Monarch, a Statesman, an aircraft or a ship, a military or government building etc.).

Today, the international community has to face organisations rooted in several different countries, easily linked among themselves by the means of fixed-line, cellular and satellite phones and Internet, and rich in financial resources. Moreover, their targets are no

¹² See Y. SANDOZ, *Lutte contre le terrorisme et droit international: risques et opportunités*, in *Revue Suisse de droit international et de droit européen*, 2002, p. 319 and C. BOURGUES HABIF, *cit.*

longer limited in space, but are potentially global. In other words, we have to face a global threat to a world which has become global in economy, in finance, in communications.

In parallel, politics and law seem to belong to old concepts and often reflect an international relations system which does not exist any more. International law instruments have become old. They basically take into account States as subjects of international relations. International responsibility, therefore, lies upon States, even when the actor in a terrorist attack is a private organisation which appears much stronger than most of UN member States. And there is no compulsory international jurisdiction for States or private actors acting within a State.

The United Nations was created to guarantee an institutional framework to maintain peace and security. The organisation was based on the decision to banish the use of force among States.

Today, the international community is much more complex than that which came out of the Westphalia Treaties of 1648 or the Vienna Congress of 1815 or even the San Francisco Charter of 1945. International Law has to deal with actors lacking the requirements for legal personality.

Armed conflicts reflect this situation rather clearly. If we read Secretary General Boutros Boutros-Ghali's "Agenda for Peace" we see that most contemporary wars are of an internal character¹³.

Many conflicts arise as the consequence of the collapse of State institutions. In these cases, international institutions should again launch trusteeship solutions (provided for in the UN Charter) or – to be even more clear – modern forms of international protectorate under UN authority¹⁴.

Recent wars have demonstrated that in cases in which national security is at stake and terrorist attacks are directed against a sovereign State in its territory, the response is a military one¹⁵. It is a typical reaction of a State under attack. But it may not be effective when the State has to face organisations other than States. A Westphalian response to a non-Westphalian challenge might not be effective.

Moreover, the reaction is an individual one, since international institutions appear too weak and reluctant to give an impression of being quick and efficient in the multilateral decision making process.

One remedy should therefore consist in the strengthening of multilateralism mechanisms such as a response to the need for legitimacy. If the UN does not work and terrorism is a threat to States and their security, it is more than obvious that they will look for remedies outside the collective security system. The same happens within States. When an individual is threatened in his life and the personal security of himself and of his family, he is tempted to use force in self-defence, ignoring inefficient State authorities.

International peace and security is a typical result of an approach based on multilateralism and institutionalisation, whereas national security is the result of a Westphalian-order-oriented approach. International law has to try and reconcile the two in an effective synthesis. To abandon multilateralism and institutionalisation would only mean going back to international disorder.

Strengthening multilateralism implies reinforcing and reforming international institutions, beginning with the United Nations. Rules governing the use of force, provisions on the availability and command of armed forces by the UN, decision-making in the Security Council have to be modified to face the global threat of terrorism.

At the heart of the problem, the international community must expressly approach the issue of the crime of terrorism in parallel with that of aggression (still in search of a

¹³ See B. BOUTROS-GHALI, *Agenda for Peace*, New York 1995.

¹⁴ See Lord SKIDELSKY, *The Return of War, the Just War Tradition and the Reform of the United Nations*, April 2004, p. 15.

¹⁵ See C. GREENWOOD, *International Law and the "War against Terrorism"*, in *International Affairs*, 2002, 301.

widely accepted definition and codification as a crime). If we have accepted the idea that certain acts of terrorism are “attacks” against a State allowing it to react in self-defence as if they were acts of aggression, the need to solve the problem of definitions for both is clear.

A definition is also needed if the international community wants to deal with conflict situations in a legal way. For instance, lacking a clear definition Taliban or Iraqi individuals remain in an uncertain position between the status of criminals under domestic law or prisoners of war under international humanitarian law instruments.

If the international law response is limited to a Security Council resolution in which the UN “unequivocally condemns in the strongest terms the horrifying terrorist attacks” and “regards such acts, like any act of international terrorism, as a threat to international peace and security”¹⁶, States under attack will always act individually and/or with the help of a few allies. The US (September 11th) or Spain (March 11th) cannot perceive the attacks as “a threat to international peace and security”. They live them as an attack to their national security, to the lives of their citizens, to the fundamental values of their civilisation. The only way to convince States to abstain from unilateral action is to convince them that the threat is understood as a global one and to strengthen the multilateral response. And this should be based upon effective action by the UN against States “responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of the attacks”¹⁷, because only the international community through its institutions should decide openly who is to be held accountable and which actions should be taken to punish not only terrorist organisations but also “rogue” States who are behind them.

To accomplish this, the concept of “self defence” is not adequate. It was conceived to deal with traditional wars in the Westphalian era, and appears inadequate to face and combat all forms of contemporary terrorism. Indeed, the concept should approach together the issues related to legitimate use of force, the limits of self defence, the notion of threat, the relationship between the narrow definition of Article 51 of the Charter and the broader concept belonging to the traditional customary law idea of self defence, which includes preventive actions.

Preventive self-defence seems to imply that States feel that they have a right – based on “natural law” – to attack the so-called “rogue States” aiding, supporting or harbouring terrorists. But this, of course, appears in contradiction with State sovereignty and its protection, and with the accepted limits to the use of force.

The Security Council has expanded its role by giving an extensive interpretation of the task of maintaining peace and security. With resolution 1373/2001¹⁸ the Security Council dealt with subject matters which the Charter places under the responsibility of the General Assembly, such as criminalisation of terrorist acts, judicial and police co-operation, financing of terrorism and freezing of financial resources of terrorist organisations. But it comes out of practice, and has not yet been codified in multilateral treaties or in an amended UN Charter.

A new concept of “prevention” should now prevail: the one based on early warning on threats (States sponsoring terrorism, stockpiling weapons of mass destruction, committing gross violations of human rights), diplomacy, bilateral and multilateral co-operation, collective use of force against rogue States, judicial remedies both against States and individuals.

The UN collective security system also refers to the role of regional organisations (Article 53). The time has come to recognise that an enlarged NATO (no longer only “North Atlantic”) has a major role to play, and the OSCE as well. Regional institutions could

¹⁶ UNSC resolution 1368/2001, September 12th, 2001.

¹⁷ *Ibidem*.

¹⁸ UNSC resolution 1373/2001, September 28th, 2001.

represent a practical solution to the dilemma facing the international community as far as the responsibility to act is concerned: that is the alternative between multilateral legitimate but weak initiatives by the UN and unilateral more effective interventions, but of dubious legitimacy, by States. NATO in the Kosovo crisis showed that a major role can be played by a strong and determined organisation in a situation in which the UN is unable or unwilling to act.

In other words, multilateralism and institutionalisation in the international community does not only involve its universal level. Regional institutions are crucial. And above all, the European Union. States in Europe cannot limit their role to criticising the United States for its unilateral initiatives. European States should blame themselves for not being able to build a common foreign and defence policy, based on a strong partnership with the US. The same partnership was at the very origin of the UN collective security system. The idea underlying the UN was that a directorate of the major Powers could decide joint action in a sort of revised “Concert”, in the framework of a strong institutional system. We are too far from that when we see that in 2003 the European members of the Security Council were divided: one permanent and one non-permanent member on one side, and one permanent and one non-permanent on the other side.

In addition, the United States and the European Union should engage firmly and jointly in actions to promote values like freedom, human rights, democracy and the rule of law in the rest of the world. In particular, they should promote initiatives to set States on the road of that separation of politics from religion, which lies at the very heart of many sorts of terrorism. They should set up political, economic, social and cultural pressures on States responsible for violations of fundamental human rights. They should also act jointly to heal the Middle East cancer. Terrorism is nourished – both ideologically and financially – by rogue States in that area, in which a war has been going on for more than half a century. The world needs a new “Westphalian peace” for a war which has lasted much more than the Thirty Years War.

Contemporary international law is largely based on international organisations and the search for legitimacy through institutions. A trend like this is clear. Some rules have still the Westphalian imprinting, but at the same time the international community has moved to the European “Concert” model and even further to the United Nations model and the era of international organisations, and it cannot take steps backwards.

Terrorism is a threat to global peace and security, and it is a challenge to the international capability to elaborate rules for an effective governance of global international relations. An effective response can only come out of multilateralism, institutionalisation and the rule of law.

TERRORISM AND ROGUE STATES

There have been many rogue states since the UN was founded and a fair number of them have been involved in terrorism. What is different is that post September 11th 2001, there may be a readiness to devise a system compatible with the UN Charter that would involve stopping the terrorism and if need be to institute regime change through sanctions and ultimately military intervention.

On September 11th 2001 there were 4 geographically linked rogue states supporting and exporting international terrorism, Afghanistan, Iran, Iraq and Syria.

The country with the longest association with terrorism was Syria. Because of its military failure to defeat Israel under the dictatorial rule of its former President Hafiz Al-Assad, it had progressively taken to terrorism as the most effective way of undermining the state of Israel. At one stage Syria had a strong army and air force and could rely on arms supplies and political support from the Soviet Union. After the collapse of the Berlin Wall in 1991 Syria made a substantive change of policy and joined the American led coalition to force Iraq out of Kuwait. After that successful military action Syria agreed to participate in the Madrid Conference and thereafter played a role in the US led Arab Israeli Peace Initiatives under President Clinton from 1993 to 2001.

Yet throughout this time Syria was the conduit for Iranian arms to Hezbollah, the Lebanese Shiite Militia. It is also well established that the attack in 1996 which killed 19 US soldiers stationed in Saudi Arabia was planned from Syria. There were high hopes when the father of the present President of Syria died in June 2000 that his son Bashar, a British trained eye surgeon, would usher in the new era. New negotiations between Syria and Israel started soon after he took office but they collapsed in November 2000 and after that Syria turned to Iraq and made a significant rapprochement. Positioning themselves to win favour amongst Arab militants Hamas and the Palestinian Islamic Jihad terrorist group were openly allowed to have offices in Damascus. There was also active encouragement to all terrorist groups to transfer money, weapons and people into the West Bank and Gaza.

Syria's trade with Iraq rose from \$50 million in 1997 to \$2 billion in 2001. The re-opened oil pipe line from Iraq to the Syrian port of Baniyas carried 150,000 to 200,000 barrels of oil a day. These arrangements did not mean that Syrian –Iraqi relations were based on friendship – rather it was one of mutual commercial advantage.

In Iraq on September 11th 2001 Saddam Hussein was in the strongest position he had been since his humiliating defeat in 1991. He had got away with evicting the UN Weapons Inspectors in 1998, he had manipulated the UN Oil for Food Programme so that it was making a massive illicit contribution to his own personal finances. Economic sanctions against Iraq were also being progressively evaded with the active encouragement on the Security Council of France, China and Russia. Turkey and Jordan were financially profiting from smuggling Iraqi oil. The ban on air travel was disintegrating since the Russians in August 2000 had flown a commercial flight into Baghdad and Jordan in May 2001 announced it was resuming commercial flights to Iraq. The Clinton Administration had tried to get Saudi Arabia and Kuwait to help reduce the oil seepage from Iraq but had been rebuffed. In Iran the revolutionary guard controlled the profits from smuggling oil from Iraq.

As a consequence the talk within the new Bush Administration in early 2001 was of introducing smart sanctions but the realists in Washington and London knew that this

would be mere window dressing and that political containment was failing by the month. Military containment was working though at a heavy cost and some risk. The southern no fly zone now imposed only by the US and UK since France had opted out was continuing and seen by Kuwait and Saudi Arabia as vital to their self defence but neither country was keen for the military pressure to be ratcheted up. And neither was Turkey in relation to imposing the northern no fly zone. It seemed that it was only a matter of time until there was a formal relaxation of UN Sanctions and Saddam Hussein was already being seen in the Arab world as having withstood US military power.

As for sponsoring terrorism Saddam was canny enough to realise that any overt involvement would bring down more international odium than he could gain by being thought to be abstaining from terrorism. Also he saw Bin Laden as being too unpredictable for a serious partnership and Bin Laden thought Saddam too secular with no understanding or sympathy with his ideology. I had watched Saddam Hussein carefully since in 1978 he had authorised the assassination of a former Prime Minister of Iraq on the streets of London. I had thrown out some 11 Iraqis who had been quite flagrantly involved and thereafter watched his Mukhabbarat intelligence agency act to destabilise the region and particularly his neighbouring countries. There has never been any doubt in my mind that Saddam used international terror to achieve some of his ends.

A supposed meeting between Muhammad Atta, the Al Qaeda operative, involved in the September 11th attacks in the US was reported to have taken place in Prague with an Iraqi intelligence official in April 2001. For awhile I believed this was a smoking gun connecting Iraq to September 11th but more and more doubts were expressed about whether the meeting took place and there was no evidence as to what had been said if it had taken place. The CIA concluded that this could not be considered as sufficient evidence of any linkage between Al Qaeda and Iraq.

Nevertheless to my mind it was perfectly justified for the US to use the changed public mood after September 11th to put their military back into Iraq to topple Saddam Hussein and for the British Government to support them militarily. The legal case for this in my mind rested on Iraq's flagrant breach of the UN's cease fire terms and of every other UN resolution from 1991 onwards. Instead of putting so much weight on the intelligence information over WMD it would have been better to have taken the *causa belli* as being the vital need to uphold the authority of UN backed cease fire agreements. The only alternative if the UN is seen to be unable to deliver ceasefire agreements is for politicians to accept the brutality of unconditional surrender.

The Iranian Revolution by September 11th 2001 had begun to run out of popular support - though the rule of the fundamentalist clergy remained intact. In 1997 the Iranians had elected President Mohammed Khatami to what they hoped would be a position of real power. Despite holding out the prospect of gradual reform by 2001 he was making little headway internally. Externally he did nothing to stop the export of terrorism. Indeed a supporter of his, Ali Akbar Mohrshemi was a founder of Hezbollah and involved in the killing in 1983 of the US Marines in Beirut.

Iran had excellent grounds for hating Iraq. They had lost over 400,000 people in the 8 year war with Iraq and around double this number were wounded and some badly maimed from bombing and the Iraqis using gas. Yet even so Iran was ready to smuggle Iraqi oil out of the country and in the process make some \$700 to \$800 million. They also made several attempts to improve relations with Iraq only to be contemptuously rebuffed.

The US was still the great Satan for those still inspired by the Iranian revolution of 1979 but there was by 2001 a measure of pragmatism coming into the relationship. For example Iran had been ready to sit around the same table with the US Secretary of State Madeleine Albright when it came to meetings with the 6 neighbouring countries of Afghanistan and the US and Russia on dealing with the Taliban Government in Afghanistan. Iran even came very close to invading Afghanistan at one stage to destroy

the Taliban when there was trouble on their border. While Iran continued their long record of exporting arms and giving other support to Shiite Jihad terrorism against Israel, they had begun to be very careful about doing the same in central Asia. They felt the need to work with former Soviet trained leaders in Central Asia in order to contain the Sunni Jihad ideology which was being fostered by Saudi money supporting Wahhabism and Deobandism through the Madrassahs in Pakistan. This was an evil, second only to that they identified as coming from the US. The killing of Shiite people by the Taliban in Afghanistan or by Sunni extremists in Pakistan forced the Iranian Government to seek closer relations with the Russians and also the Chinese. Both countries were ready to sell them arms and missiles. All three countries recognised they had a common interest in curbing Sunni militancy in Central Asia. A summit meeting in 1996 called by China led to the formation of the Shanghai Five whereby China, Russian, Tajikistan, Kazakhstan and Kyrgystan all of whom shared common borders started formally to cooperate together. In 2000 they became the Shanghai Forum with Uzbekistan being given observer status and then full membership in 2001 in the Shanghai Cooperation Organisation. In the words of the President of Kazakhstan in June 2001 the cradle of terrorism, separatism and extremism was the instability of Afghanistan.

The Uighurs from Central Asia and from China were at this time being recruited and trained by the Islamic Movement of Uzbekistan (IMU) and Beijing felt the threat of Jihad in its important province of Xinjiang. Indeed the IMU is far more threatening to China than al Qaeda but there are very close links between the two organisations and so for China those who struggle against al Qaeda are helping them in their fight against the IMU.

Gradually in Iran some people with a record of revolutionary zeal are beginning to see that they have a vested interest in reviving the former friendship under the Shah with the United States. In the Iranian oil towns already the return of the oil technicians would be a popular outcome. It is possible to believe that had the 52 American hostages not been taken and held for 444 days then the US might not have sat back and cynically allowed the Iran-Iraq War to continue as a means of quenching Iranian fundamentalist fervour. Certainly the consequences of that war have been extremely adverse. Iran does not just fear Israeli nuclear weapons and the potential for Iraq to develop nuclear weapons but they are also well aware that Pakistan now a nuclear power was helped financially by Saudi Arabia. It is hard to see any Iranian government that overthrows the clergy not continuing with their nuclear programme.

The Afghanistan that the world woke up to in September 2001 was a product of Pakistan backing the Taliban. The Taliban had only emerged in 1994 but they offered the Pakistan military intelligence, itself a powerful faction within the Pakistan Army and containing many fundamentalist officers, the opportunity to establish in Afghanistan the strategic depth they had long sought to help them in their struggle with India. I visited Pakistan a number of times in the 1980's while President Zia was supporting the Afghan Mujahedeen. It was obvious that Zia was being encouraged and financed to do so by the CIA. At that time I, too, believed that challenging the Soviet Union's occupation of Afghanistan by helping arm the Afghans was an acceptable policy. Some of the Mujahedeen leaders were charismatic people and not fundamentalists, very similar to the Afghan tribal leaders I had camped out with in their mountain tents when I had visited Afghanistan as a student in 1959. Yet in retrospect it is possible to argue that our actions were destabilising Afghanistan long after the Soviets withdrew, just as our support for continuing the Iran-Iraq War still leaves profoundly adverse consequences. This is one of the dilemmas of international diplomacy. Short term actions by big powers can have long term repercussions particularly when accompanied by only a transient preoccupation can lead to long standing regional instability.

When the Soviets pulled out of Afghanistan Islamabad was less interested in pursuing a peaceful settlement than in ensuring Pakistani control, not just of Kabul but in

gaining influence in Central Asia and particularly Turkmenistan. It is easy to forget that the port of Karachi is only 1700 miles from Dushanbe in Tajikistan which is itself 2125 miles from the Iranian port of Bandar Abbas and 2625 miles to Rostov on Don in Western Russian. By 1994 the Pakistani's favoured Afghan leader, Gulbuddin Hekmatyar, was in bad shape and looked as if he was not able to win control of Kabul. So it was to the Taliban that Pakistan looked towards to deliver a safe oil pipeline from Turkmenistan through southern Afghanistan to Pakistan.

The Taliban ideology of Deobandi Islam was alien to Afghanistan; nevertheless, for two years their ability to bring back order and instil discipline was popular with most Afghans. Prior to 1996 in Kabul 50,000 Afghans had lost their lives in 4 years of almost continuous fighting. The Taliban had no links with international terrorism until they came to know Osama bin Laden when they captured Kabul that same year. Yet by September 2001 the whole world saw how the combination of ideological zeal, large sums of money and a state giving sanctuary to terrorism could produce a whole series of provocative attacks, first on Americans abroad and then with a carefully planned and executed terrorist attack inside America provoke the world's only superpower into a declaration of all out war.

In May 2004 we can attempt to make an interim assessment of what that war has achieved. There has been regime change as a result of military intervention in Afghanistan and Iraq. In Afghanistan the US masterminded a brilliantly successful and unconventional military attack which demoralised the Taliban who fled largely into the hills. The Americans could not have done this without the support of the Northern Alliance warlords yet this linkage holds the seeds of a flawed settlement in Afghanistan. The Bonn Accord signed in December 2001 very clearly enjoined those war lords to stay out of Kabul but they ignored that demand and ensconced themselves very firmly in the capital. The first Loya Jurga chose as an interim President Karzai, a Pashtun who had no militia of his own. The second Loya Jurga agreed an interim constitution. Karzai is expected to be elected as President before the US elections in November 2004. A new Afghan army has been established at around 5000 men it is neither large enough or strong enough to challenge the warlords from the pre Taliban days. People like Abdul Dostum, Rabbani, the former President, Muhammed Fahim, and Abdul Syyaf, who is himself a member of the Wahhabi sect and has close links to Saudi Arabia, form the Tajik and Uzbek dominated Northern Alliance. They have been constantly doing deals with the US forces of around 11,000 over attempts to catch bin Laden and the Taliban leaders. This is the highest US priority but it makes it impossible for Karzai to impose his authority. Gulbuddin Hekmatyar, having fled to Iran in 1996, continues to fight the authority of the Central Government. All this time the Taliban is creeping back into positions of local power.

The illegal trade in opium, virtually stamped out by the Taliban, reached a value of over \$2 ½ billion in 2003. Afghanistan is no longer a rogue state but it is a narco state with drug trading rampant. Humanitarian aid runs around \$42 per head as distinct from the \$75 a head Karzai was promised and runs at a level much less than Bosnia or Kosevo. The Americans have built a brand new highway from Kandahar to Kabul and some good work is being done in the provincial reconstruction teams (PRTs). The present NATO led ISAF with 6,000 men stationed in Kabul is no match, however, for the warlords countrywide. Unless a larger international force is provided and President Karzai fully supported economically and politically, Afghanistan will slip back. Some in America question whether that would matter geopolitically if Osama bin Laden were found and brought to trial but we should be very careful not to underestimate the potential for Afghanistan to continue to provide a focus for terrorism from Al Qaeda and the IMU.

In Iraq despite another well executed and innovative US dominated military intervention including the capture of Saddam Hussein a deeply troubling insurgency is underway which appears to be gathering momentum. This insurgency is opportunistic and composed of many elements but its potency comes from the Sunnis and foreign Islamic

fundamentalists. They are stretching the US military led coalition to its limits and straining the political base inside the coalition forces countries. Public opinion in the coalition countries thought their forces would restore the Iraqi infrastructure quickly and win over the hearts and minds of a population glad to be rid of Saddam. Tragically, due to a combination of incompetence and ineptness from the coalition, things have not turned out that way despite the military protecting the oil infrastructure. Even the military acknowledge that it was a mistake to be seen standing by while looting went on in Baghdad and Bazra while ministry's records were trashed and hospitals equipment stolen. The slow restoration of water supplies, the poor functioning of a totally inadequate sewage system and even the inability to deal with the petrol shortage have made the Bush boast of Mission Accomplished a sick joke. The psychological boost that came from the initial liberation has been lost and the military is becoming ever more depicted as an occupying force. The all important claim to be introducing democracy was then dealt a deadly blow by the revelations of sadistic torture and sexual abuse.

The difficulty of keeping the different religious groupings and ethnic identities working harmoniously towards an interim government in July and elections in January 2005 is proving to be very difficult. The truth is grievous errors were made by the politicians that have besmirched the military. The decision of President Bush – euphoric after the military victory – to give Secretary of State Rumsfeld the lead role in post war Iraq instead of Secretary of State Powell led to the Department of Defence sweeping aside all the careful planning, meticulously prepared by the State Department for post war reconstruction and democratisation.

This was compounded by the Department of Defence's pre war links to the expatriate Ahmed Chalabi faction which led to some wild intelligence and ill advised decision making. The British cannot escape responsibility for this post war debacle. Iraq was created out of the 3 provinces of the Ottoman Empire as a British Mandate by the Peace Treaties following the First World War. Under King Faisal I the companion of TE Lawrence in the Arab revolt and a Regency before his grandson Faisal II took over, British influence remained strong for two decades after the Mandate was terminated in 1932. Even though our Embassy was burned to the ground in Baghdad in 1958, we retained influence under the coup leader, Lt. Col. Qasim who was assassinated in 1963. In 1968 the Ba'ath Socialist Party that took over ushered in soon the dictatorship of Saddam Hussein. Given all that history for Prime Minister Blair not to have insisted that British diplomatic expertise and business contacts were not fully utilised in the planning for post war Iraq from the summer of 2002 is inexplicable. Given the postponement of our military deployment in 2003 it was inevitable that we did not play militarily as significant a role as we did in 1990-91 in the Gulf War. There is not much point in having a supposedly special relationship, however, if we cannot at least put our historical knowledge and experience into a joint planning exercise for maintaining peace, particularly since most American diplomats and military leaders acknowledge that this is an area where Britain's military in Bosnia, Kosovo and Africa has, overall, an excellent record.

The reason I fear for this failure to assert a UK input is that since 2001 when the Prime Minister established his new Foreign and Defence Secretariat inside No 10 Britain has had a dysfunctional system of government now painfully exposed by what has happened in Iraq. Power has been deliberately centralised in the Prime Minister's office at the expense of the Foreign Office, the Defence Department and that of Overseas Affairs. No 10 has aped the role of The White House and the highly personalised decision making of Tony Blair is something we have not experienced since Sir Anthony Eden's disastrous handling of the Suez Crisis.

Perhaps the machinery for achieving wiser decisions is starting to come into place. The involvement of the Secretary General to the UN's adviser for Iraq, Brahimi, who did so well in the early days in Afghanistan may lead to a credible Iraqi authority being

established at the end of July. But against that, the announcement of Colin Powell and Jack Straw that Coalition Forces will not stay beyond the end of July if this new authority asks them to leave is, I fear, another error, potentially precipitating an early withdrawal. That reality may be correct but it would be better to have been left unsaid because it will open the new and fragile Authority up to immediate lobbying to demand withdrawal and removes the necessary element of doubt as to whether we would go. It is very hard now to see NATO becoming the military authority in Iraq and nor is it likely that the UN, even if stiffened by Russian, French and German forces, would be ready to come in. There is an absolute need for the US led coalition to stay on the ground militarily at least until after the January 2005 elections and ideally for a year longer.

The biggest dilemma facing everyone is whether Iraq should be unified under a Shiite majority. Unification has been the traditional model favoured by Arab experts in the US State Department and the British Foreign Office but they have been content to have this maintained by the Sunni minority. I believe the only viable model is to accept that at the very least there will have to be 3 largely autonomous areas politically controlled by the Shiites, Sunnis and Kurds and because of the deteriorating security situation, it seems inevitable that they will also be vested with the task of maintaining security. It will be many years before there could be, even if it were desirable, a credible Iraq national army or police force. It would be better to concentrate on building these units up so that they can control Baghdad and have a permanent presence in Kirkuk which the Kurds wish to control on their own. The Kurds have experienced a long period of autonomy since Operation Provide Comfort was launched on April 16th 1991. Then US, UK and French forces using a No Fly Zone north of the 36th parallel carved out a 'safe haven' for the Kurds in Iraq. That Operation remains one of the most successful of all the post Cold War humanitarian interventions. It prevented a genocide and demonstrated that the UN Charter had got the flexibility to allow for outside military action within a hostile sovereign state. The Kurds, however, can no more expect to control the oil assets in Kirkuk than the Sunni and Shiite regions can expect to control the oil pipelines, reserves and infrastructure that would lie within their autonomous regions. Iraq must have a central government that can control Baghdad and exploit to the full the oil resources on which the whole future prosperity and stability of the country depends. Democratisation is important but whereas one hoped it could take root early, it will now not be as easy to establish given the failures of the transition. Instead of one democratic model covering the whole of Iraq, probably the most we can expect to see is a different pattern adopted, reflecting the different traditions of the Shiite, Sunni and Kurdish regions.

Iraq's neighbours will all try to influence its future. One of the successes of US diplomacy to date has been how it has influenced Turkey's response to the Kurds as well as Israel's stand off from the military operation and Kuwait's whole hearted cooperation with the coalition. As to Iran, the jury is still out. Certainly some elements in Iran are supporting Shiite militias in Iraq, others are playing the issue more carefully and encouraging moderate Shiites in Iraq. The key determinant will be how Washington relates to the Shiites in Iraq and so far Ambassador Bremer has handled them sensitively. The best hope is to foster that strand of Iraqi/Shiite clerical opinion which does not wish to replicate the pattern of political interference followed by their fellow Shiite clerics in Iran. These Iraqi clerics have to be persuaded by their own people that an all powerful Shiite central government is a recipe for continued misery and strife. They also have to be ready to withstand pressure from Iran which will favour a theological power structure for Iraq. They will have to resist those in Iran who want to influence Iraq's energy policy. Iran will also make reparation claims on Iraq's economy and has demands over the Shatt Al Arab.

In relation to Iran, the British Foreign Secretary, Jack Straw, has cleverly carved out a role for himself and the Foreign Office in Teheran which has been helped by the UK being most involved in the south of Iraq and based in Basra. The American position is

complicated by past history and here the proving ground is how the Shiite population and their clerical leaders are dealt with in the American controlled areas of Iraq.

What of Syria? In May 2004 the US announced the impositions of sanctions but the EU refused to follow suit. There are traditional differences across the Atlantic in how Syria is handled, mainly relating to the Arab-Israeli question. The EU still hopes that Assad's December 2003 invitation to Sharon for talks over the Golan Heights will be taken up. It is significant in this context that in January 2004 Assad became the first Syrian head of state to make an official visit to Turkey. The Turkish-Israeli strategic agreement unnoticed and unsung is one of the most significant relationships in the Middle East. The American Government will be influenced by Turkey. But at the moment they are concentrating on Syrian reluctance to stamp out the cross border movement of Islamic fundamentalist fighters into Iraq. The Syrian border is hard to police and it is not as easy to shut it off as the Americans sometimes imply. The problem, however, is the old Syrian habit of playing the double game.

In Jerusalem the Israeli military intelligence chief informed the Knesset in January 2004 that Assad had told terrorist organisations operating out of Damascus to lower their profile and his own officials to temper their rhetoric. Whether the president of Israel's invitation in January to Assad to visit Israel was disingenuous or not, the statement that followed from Sharon to the Knesset was the voice of realism: 'no one should have any illusions. The price of peace with Syria is leaving the Golan Heights.' There could be significant progress towards peace if Israel were to simultaneously conduct a withdrawal from Gaza and make political progress over resolving their dispute with Syria on the Golan.

The question for American policy is how much the Syrian and Iranian governments respond to pressure. In Syria the US Administration is acting under the Syrian Accountability and Lebanese Sovereignty Restoration Act which means they have all party support in Congress. They have too the precedent of Colonel Gaddafi who has been under constant pressure military and economic since 1986 when President Reagan flew retaliatory air attacks in response to a terrorist incident involving American troops in Germany. Libya has now renounced its nuclear weapons programme, the possession of chemical and biological weapons and stopped all terrorist activity. It is not inconceivable that the young President Assad can in a rather less public and extravagant way follow the same course but he will not do so unless it is to be accompanied by a settlement with Israel. What is necessary immediately is for Assad to resist the temptation to create mischief in Iraq and to tweak the American's tail while they are under such great pressure from within.

In Iran it is easy to forget how long the US Congressional sanctions have been in place. And here the skill will be not to tighten them but to know when to relax them. For the moment, the Iranians have been exposed as having misled the world about the extent of their nuclear weapons programme and have been in non proliferation terms somewhat embarrassed. Yet Iran has interests in common with America in Central Asia and Afghanistan. For a time there was even cooperation over the Taliban and Al Qaeda. If Syria were to curb their Iran-Hezbollah nexus, and cooperate with the CIA against Al Qaeda, it is just possible that Iran might see advantages in doing the same. Americans are popular with most Iranians. The oil towns in Iran would welcome back American oil technicians. The problem is that as yet the clerics fear that the path of reform means the replacement of the Shiite faith. Somehow the reformers and those who support them have to reconcile the two. The place where this might first be done is Iraq.

The end of May 2004 is not a time for optimism about Afghanistan, Iran, Iraq and Syria but nor it is a time to contemplate giving up on radical reform. The fact that two of these four countries are no longer rogue states and that their capacity for exporting terrorism has been much reduced leaves room for hope. It is still possible that there will be

changes in Iran and Syria and that they will accept the discipline of the international world, abandon their rogue status and stop exporting terrorism. Only this will bring them both peace and prosperity. But before this can be achieved the US and the UK must develop quickly a far greater degree of competence, historical sense and sophistication in the handling of the post war situation in both Iraq and Afghanistan.

Bibliography

1. THE THREATENING STORM: The Case for Invading Iraq Kenneth M. Pollack, Random House/New York 2002
2. THE IRAQ WAR: Strategy, Tactics and Military Lessons Anthony H Cordesman Praeger 2003
3. GHOST WARS: The Secret History of the CIA, Afghanistan and Bin Laden from the Soviet Invasion to September 10, 2001 Steve Coll Penguin 2004
4. JIHAD: The Rise of Militant Islam in Central Asia Ahmed Rashid Yale University Press 2003
5. Foreign Affairs May/June 2004 for two articles: 'Afghanistan Unbound' Kathy Gannon page 35-46 and 'The Road to Damascus' Steven Simon and Jonathan Stevenson page 110 - 118

Professor Mary Kaldor, *Professor in Global Governance at the London School of Economics*

JUST WAR AND HUMANITARIAN INTERVENTION

Sovereignty has changed. It is becoming much more conditional on domestic behaviour, consent and international recognition. Not all states conform to these features – we have states that do not conform, we have failed states, we have rogue states, we have the United States, which is the only state strong enough not to take into consideration international conditions and repercussions.

So what does this changed world imply about humanitarian intervention? I like to think of humanitarian intervention not as war but as international law enforcement. In fact, I don't like use the term humanitarian intervention. I prefer to use the term international law enforcement. There are, of course, other situations and I'm not going to go into them, and not only Iraq. But the situations I am concerned with I call "new wars", which involve a mixture of political violence, human rights violations and organized crime. And during wars violation of international humanitarian law, human rights and genocide convention as well as criminal law.

So there have to be mechanisms for intervention where states fail to deal with these. One of the things we have talked about has to do with what authority. How does use of force differ from warfare?

Law enforcement does not mean that soldiers should not kill anyone because that is what soldiers are supposed to do when necessary but what it means is the way they use that force is very very different – based on principles of law enforcement rather than on principals of war fighting. And I would like to say a few things about what those differences are.

One of the differences has to do with casualties. That's probably the most important difference. If you are fighting a war it has signs. You may decide not to recognise non-combat casualties. You may even decide not to recognise all casualties. But you definitely want to recognise your own casualties first so there is a kind of hierarchy of casualties in war. If you take the war in Iraq, American soldiers came top, Western journalists came second, Iraqi civilians came third and Iraqi combatants came forth. In fact, no one has really bothered to count how many Iraqi combatants were killed.

And in a law enforcement operation you realise all casualties. Indeed, a policeman should risk his own life to save the lives of people he is there to protect (which, of course, does not always happen). And if you take again Iraq, it stands out from the other wars because the allies, the coalition, did try to minimise the collateral damage. By the standards of war, civilian casualties were rather low – as Jack Straw said in the parliament yesterday, 10,000. But 8,000 were killed in Srebrenica. There is a way in which there is a sort of blindness towards civilian casualties, which is not seen in the rest of the world. Which is not seen by those of us who think in human rights terms.

So, my first point is that there is a very different attitude towards casualties.

My second point, which is basically the same point, is that during humanitarian interventions the point is to protect people, prevent violations of human rights and to prevent genocide. You might want to catch and arrest those who are particularly responsible. In fact, you might have to do this. And, in fact, this may involve a certain degree of war fighting. But the balance is changed.

When you are involved in counter-insurgency, like Americans are, for example, in Iraq, you primary aim is to stop insurgence. You might decide, like the British in their counter-

insurgency efforts, that actually protecting the local population is a very good method to beat the insurgency. It is a good method because you need to prevent local population from supporting the insurgents. This is actually a means to an end.

I think that a law enforcement is exactly the other way around. That you main is to protect the population and to protect the population you've got to capture and arrest criminals. To be protecting the population gives you an advantage in capturing the criminals because you get more support and information.

My third point is that insurgents should be treated like criminals. It means that your aim is to arrest them and to bring them before the court. Again it may be consistent with the just war cause – your aim is to take prisoners rather than to kill them.

My final point is that the aim of law enforcement is containment and stability rather than war. It is actually a recognition of limitations of military force. The aim is to stabilise the situation and recognise that no solution can be found militarily. I think that the French could have won a military victory in Algeria. Israel in my view is actually winning a military victory. But politically both cases are disasters.

So, it is time for recognition of that, in fact, a military victory does not always enable us to find a political solution.

While I am on this topic, let me speak about the issue that came up in the morning – torture. In the Iraqi case, I do think that torture is an inevitable consequence of military approach to winning a counter insurgency. I think it was true in Algeria, it was even true in Northern Ireland – you have to torture people in order to find out who the insurgents are.

I want to say a couple more things. How would this approach apply in Iraq? What would humanitarian intervention in Iraq look like? I think that you need a different strategy. The strategy towards Iraq was entirely based on the idea that Iraq is a local as well as international threat. Therefore the strategy was bounded by the assumption that there were weapons of mass destruction. Nothing was found internationally about the internal situation in Iraq. Resolution 687 did contain all kinds of things about human rights but nobody ever worried about Iraq not complying with this aspect of the resolution.

So, I think that the first point would be why there was no external pressure on the Iraq regime to start respect human rights. In fact, some people who were on the ground did ask this very question: why didn't the West send human rights monitors as well as weapons inspectors. Certainly, I was making this argument in the run up to the war and a lot of people said that this of course would not work: you cannot open up the Iraq regime except for war. And I had two answers. One was: I was very involved in the opposition in the early 80s and was constantly told this. But the other argument is that they should be given sufficient time.

Then the second aspect about all this is the use of force: could you have done this without the presence of the Western troops in the border to put pressure on Saddam Hussein? But may be you did not need any Western troops. The argument should have been whether to have them in case of another humanitarian disaster. If, for example, Shia uprising has happened, then the troops would have come in then this would have been a very different kind operation from when you come in to topple the regime. And that's an illustration (and I could give other illustrations) of what I mean between the difference between a law enforcement operation and a war fighting operation.

Just a final point: I would welcome very much efforts to encourage a public debate on these issues. Lord Dahrendorf, for example, said earlier today that may be the international law itself was wrong. But what determines what is right and wrong? I was a member of a commission for intervention and we came to the conclusion that the Kosovo intervention was legitimate and that there was a big gap in international law because, although there were massive violations of human rights, there was no mechanism other than Security Council for responding to those violations.

Whether we were right or wrong, the issue there was that the Kosovo intervention, unlike the Iraq intervention, has a lot of public support and there was a lot of civil society pressure to do something about the situation there. There was much less public pressure in the case of Iraq. But I do think that's what really critical for democratic societies is that law is based on some kind of consensus. And at the international level this is more important than at the domestic level because, although I am making a case for international law enforcement, it consensus at the international level would be much more narrowly based than on the domestic level. Therefore, consensus requires public debate, public consultations and public support. And this is what we want.

APPENDIX

Justified War, Iraq and Reform of the United Nations

One day colloquium

SUMMARY

The first session, chaired by Ambassador Bottai, explored the usefulness of the Just War tradition. Professor Biggar cogently defended the Iraq war by reference to Just War criteria. Lord Garden equally cogently attacked the Iraq war using Just War criteria. This established the main strength of this tradition: the possibility of arguing from the same premises. Father Kukah reminded us that Just War is not the only Christian tradition of war; moreover it is a fluid concept which can be manipulated. It dates from days when God was sovereign, not nations, and therefore its applicability to contemporary conditions is open to question.

To Kukah's charge that nations applied their morality selectively, Biggar answered that it was better to be responsible inconsistently than consistently irresponsible.

Professor Halliday was sceptical about setting up 'angelic' standards to judge the conduct of international relations: everything was determined by politics, including the angelic standards.

The second session was devoted to the United Nations and rogue states. Professor Greppi argued that 'a Westphalian response to a non-Westphalian' challenge might not be effective. The self-defence criterion of the UN Charter was not adequate to deal with the terrorist challenge. Terrorism must be added to aggression as a ground for coercive intervention. The UN should develop a new conception of 'prevention'. Professor Greppi hoped the UN Security Council would become a global 'Concert' of Great Powers.

Lord Owen argued that the will to go to war was more important than paper agreements. The UN Charter was a sufficiently robust document: it was the will to apply it which was lacking. He traced the split between Britain and the Continent of Europe to Margaret Thatcher's opposition to German reunification. He insisted that containment hadn't worked in Iraq. The post-invasion treatment of Iraq had been mishandled, but it would be fatal to retreat. In particular, a unified state was needed to guarantee central control of oil production & revenues. The Security Council needed to be reformed.

In the third session, devoted to the question of the legality of the war on Iraq, both speakers, Professor Marc Weller and Mark Littman, QC agreed that the war was illegal, Mr. Littman more emphatically. Lord Dahrendorf then raised the question: if the war was illegal was it therefore wrong, or did it show that international law was inadequate? It was pointed out in discussion that the implication of Dahrendorf's question was that the legal analysis of the war reached the wrong conclusion. But it may have reached the right conclusion. Mr. Chiesa said that it was essential to the concept of international law that no one state had the right to declare what it was unilaterally. Security Council mandated intervention had to be consensual. The US invasion of Iraq was a revolutionary act. Professor Halliday asked what the difference was, in terms of international law, between the invasions of Kosovo and Iraq. Politics, not law, decided in each case.

The fourth and final session considered the issue of humanitarian intervention. Mary Kaldor had a problem with the Just War framework, especially as it applied to humanitarian intervention. Humanitarian aims cannot be fulfilled by warlike methods. 'There is no such thing as a 'civilized war'. 'Civil society' is the alternative to war. Robert Skidelsky argued that states remain the decisive actors in any humanitarian intervention. They alone are in a position to commit troops and resources. This reflects the fact that there is no world government, no legal or moral authority to which a state is bound to submit. Lord Skidelsky advocated activating the UN 'trusteeship' system to deal with the failed state problem.

Professor Prins pointed out that new military technology had made the proportionality and discrimination criteria of jus in bello applicable again for the first time in a hundred years. Lord Hannay preferred the Just War linguistic usage 'duty to protect' to 'humanitarian intervention'. It was further pointed out in discussion that the notion of enemy defeat no longer applied in the usual way. Iraq showed that the lack of decisive victories meant that there was no end to war. Mr. Yahia Said said that the very lack of destructiveness of modern war meant that there was no 'shock' of defeat such as in 1945.

Robert Skidelsky, 25 May 2004